In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1518

C. JON HANDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 1-11) is reported at 454 F.2d 885.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1971 (Pet. App. A, 11). A petition

for rehearing and for rehearing *en banc* was denied on March 22, 1972 (Pet. App. B). On April 18, 1972 the time for filing a petition for a writ of certiorari was extended by Mr. Justice Douglas to May 20, 1972, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in requiring petitioner to submit to a psychiatric examination, conducted outside the presence of counsel, as a prerequisite to petitioner's use at trial of expert testimony on the issue of his mental capacity.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner, the corporate manager of Palm Springs Panorama, Inc. ("P.S.P."), was convicted of submitting a false document to an Internal Revenue agent, in violation of 18 U.S.C. 1001, of willfully preparing false corporation income tax returns, in violation of 26 U.S.C. 7206(2), and of attempting to evade and defeat the corporation taxes of P.S.P. for 1964 and 1965, in violation of 26 U.S.C. 7201 (R. 1-8, 709-710, 764-765).[1]

At the commencement of the trial, the district court was advised that petitioner would offer expert

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[1] "R." references are to the three-volume clerk's file certified by the district court clerk. "Tr." references are to the court reporter's transcript of testimony and proceedings in the district court.

testimony of psychiatrists who had interviewed him to support his defense of mental incapacity to commit the offenses charged. Upon motion of the government, the district court thereupon issued orders appointing two additional psychiatrists (Drs. Alvin E. Davis and Harold C. Deering) to examine petitioner and to submit reports bearing on the issue of mental responsibility.[2] The orders (R. 501-502, 511-512) required petitioner to supply such information as would be required by the psychiatrists to conduct the examination, and the orders further provided in part as follows:

> * * * such examination shall not be in the presence of any counsel or stenographer designated by defendant. If defendant does not comply with this order he shall be precluded at trial from presenting testimony upon the issue of his alleged mental incapacity by any expert by whom he has been interviewed.

Copies of the indictments were attached to the orders for the information of the psychiatrists, and Drs. Davis and Deering, as well as other psychiatrists called by petitioner, testified that petitioner's attorneys and the prosecutor furnished them with miscellaneous other documents, such as the opening statements, psychological and psychiatric testing and interview reports, and other records and information

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[2] The district court had previously entered an order appointing Dr. Davis to examine petitioner for the purpose of determining mental competency to stand trial (R. 455).

(Tr. 1558, 1626, 1663, 2235, 2247, 2305, 2345-2355).[3]

On direct examination, the psychiatrists (including Dr. Davis) called by petitioner to testify that he did not possess mental capacity to commit the charged offenses related, *inter alia*, petitioner's narration of his tax problems and his assertions that his conduct was lawful and legitimate (Tr. 2309-2310). The psychiatrist (Dr. Deering) called by the government to testify that petitioner did possess mental capacity to conform his conduct to legal requirements, did not testify on direct examination to any statement by petitioner of an incriminating nature (Tr. 2223-2242).

In addition to the testimony of Dr. Deering, there was testimony by lay witnesses that they had dealings with petitioner during the period when the charged offenses were committed and that they had then considered him sane. The evidence showed that petitioner had been able to conduct complex business transactions during this time, which was further indication of mental capacity. The evidence also established a consistent pattern of filing fraudulent returns, and, as the court of appeals noted, the "overwhelming evidence support[ed] the Government's contentions" that petitioner caused a false deduction of $709,963 to be taken on P.S.P.'s 1964 tax return for

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[3] In response to a request by petitioner's counsel, the prosecutor informed the court that he had given Dr. Deering reports of the examinations by other psychiatrists. He also furnished a copy of the government's opening jury statement (Tr. 1470-1471, 1577, 2235, 2242-2244, 2247, 2281).

a fictitious management fee to petitioner, and that he also caused a false deduction of $900,000 to be taken on P.S.P.'s 1965 tax return for a fictitious forfeiture of a land contract deposit (Pet. App. A, 1-3).

The court of appeals affirmed, holding that the district court's orders appointing psychiatrists were within its statutory and inherent powers and did not compel petitioner to incriminate himself in violation of the Fifth Amendment or deprive him of the assistance of counsel in violation of the Sixth Amendment (Pet. App. A, 3-5).

ARGUMENT

1. Relying on *United States* v. *Wade*, 388 U.S. 218, petitioner contends (Pet. 9-31) that the district court's order prohibiting counsel from attending the psychiatric examination constituted a denial of his Sixth Amendment right to counsel. This argument has now been considered and rejected by several courts of appeals. *United States* v. *Albright*, 388 F.2d 719 (C.A. 4); *United States ex rel. Wax* v. *Pate*, 409 F.2d 498 (C.A. 7), certiorari denied, 396 U.S. 830; *United States* v. *Baird*, 414 F.2d 700 (C.A. 2), certiorari denied, 396 U.S. 1005; *United States* v. *Smith*, 436 F.2d 787 (C.A. 5). Although there are contrary dicta in *Thornton* v. *Corcoran*, 407 F.2d 695 (C.A. D.C.), there is in fact no conflict among the courts of appeals on this issue and it warrants no further review by this Court.

The factors viewed in *Wade* as requiring the presence of counsel at police lineups are not applicable

to psychiatric examinations. In *Wade*, this Court was concerned with the possibility of improper suggestion or other conditions at the lineup prejudicial to a suspect and with the defendant's inability to reconstruct such unfairness at trial. Noting that "[n]o substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel" (*Wade*, 388 U.S. at 237), the Court concluded (*id.* at 236-237):

> Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution * * *. [Footnote omitted.]

The dangers of improper police suggestion or other prejudicial conditions do not similarly exist in an examination undertaken by an independent psychiatrist. Moreover, effective cross-examination of psychiatric testimony does not depend upon presence of counsel at the interview between psychiatrist and defendant but rather upon a knowledge of the techniques and principles of psychiatry. As this Court has noted in connection with other forms of scientific analysis, the "variables in techniques [are] few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-ex-

amination of the Government's expert witnesses and the presentation of the evidence of his own experts." *Wade, supra,* at 227-228.

Petitioner here suffered none of the disabilities found controlling in *Wade.* He was represented by able counsel who had extensive experience with medical and psychiatric defenses, and he presented in his defense the testimony of four psychiatrists and a psychologist. Furthermore, the trial court ordered that petitioner receive a copy of any report prepared by the court-appointed psychiatrists. Under these circumstances, it cannot be said that absence of petitioner's counsel at the psychiatric interview deprived petitioner of effective legal representation.

Moreover, there are strong countervailing reasons for denying a defendant the company of counsel at a psychiatric interview. Unlike a lineup, the psychiatric examination is a sensitive diagnostic process which requires privacy and a non-adversary atmosphere in which communications may be freely exchanged. This diagnostic process would be adversely affected, and the associational dialogue between defendant and psychiatrist would be seriously inhibited, by the presence of any third party, and especially by the presence of counsel.

2. Petitioner also contends (Pet. 37-43) that the order conditioning petitioner's use of expert psychiatric testimony at trial on his submission to a psychiatric examination violated his privilege against

self-incrimination.[4] This argument rests upon the proposition that the privilege against self-incrimination itself extends to psychiatric interviews. This proposition has frequently been rejected by the courts of appeals. *United States* v. *Baird*, 414 F.2d 700 (C.A. 2), certiorari denied, 396 U.S. 1005; *United States* v. *Bohle*, 445 F.2d 54 (C.A. 7); *Albright* v. *United States*, 388 F.2d 719 (C.A. 4); *Pope* v. *United States*, 372 F.2d 710 (C.A. 8), vacated and remanded on other grounds, 392 U.S. 651. There appears to be no conflict among the courts of appeals on this issue and it warrants no further review by this Court.

A defendant's statements to an examining psychiatrist do not in themselves constitute incriminatory communication or testimony within the protection of the privilege. Cf. *Schmerber* v. *California*, 384 U.S. 757; *California* v. *Byers*, 402 U.S. 424. And introduction, over the defendant's valid objection, of any such statements into evidence is, as the court of appeals below noted, strictly prohibited (Pet. App. A, 5).

Furthermore, the district court's order was a narrow and reasonable restriction on petitioner's ability to adduce expert testimony in his defense. As the Second Circuit stated in *United States* v. *Baird*, *supra*, at 708-709:

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[4] Petitioner also argues (Pet. 32-36) that the order deprived him of due process and "fundamental fairness." However, this argument appears in substance to be merely a restatement of petitioner's other arguments under the Fifth and Sixth Amendments.

> [W]here * * * the defendant puts in evidence the opinion testimony of his expert, the Government has the right to have its expert examine the accused to put in evidence his opinion testimony in rebuttal and * * * the exercise of such right by the Government does not infringe the defendant's right against self-incrimination. * * * [A] defendant who raises a defense based on criminal responsibility is estopped from making an effective objection to the Government's proceeding in this fashion * * *.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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